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No. 05-583

IN THE
Supreme Court of the United States

RICHARD GAMMICK, JOHN HELZER
and WASHOE COUNTY,

Petitioners,

v.

RENE BOTELLO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE NEVADA DISTRICT ATTORNEYS ASSOCIATION AS *AMICUS CURIAE* SUPPORTING PETITION FOR WRIT OF CERTIORARI

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Motion for Leave to File Brief *Amicus Curiae* of The Nevada District Attorneys Association, in Support of Petitioners

Pursuant to Supreme Court Rule 37.3(b), the Nevada District Attorneys Association moves this Honorable court for leave to file an *amicus curiae* brief in support of the Petitioners. The *amicus curiae* brief follows this motion.

Petitioners have consented to the filing of the attached brief. Respondents have withheld consent.

The Nevada District Attorneys Association is a voluntary, unincorporated association of district attorneys that works with legislatures, courts and local policy makers to ensure that the interests of prosecutors are appropriately represented. The Nevada District Attorneys Association also works to educate prosecutors in the area of prosecutorial training and ethics.

Amicus is concerned with an issue in this case, specifically whether the communication of the prosecutor to the School Police Department regarding the employment and status of Respondent in investigations should be given absolute immunity. The Ninth Circuit's ruling in this case is troubling because it limits the immunity granted to prosecutors and will effectively chill future prosecutorial decisions and communications. Amicus wish to write separately to emphasize the effect of the limitation of the absolute immunity doctrine created by the Ninth Circuit's decision.

Respectfully submitted,

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STATEMENT OF INTEREST OF AMICUS[1]

Pursuant to Supreme Court Rule 37.4, The Nevada District Attorneys Association submits its brief in support of Petitioner's writ of certiorari.

This case involves an issue of the scope of prosecutorial immunity. The Nevada District Attorneys Association is comprised of prosecutors within the jurisdiction affected by the ruling of the Ninth Circuit. The court's decision would have negative implications for prosecutors within the jurisdiction, and therefore, this Court should consider the views of the Amicus.

INTRODUCTION

This case involves the determination of the Ninth Circuit to limit the scope of prosecutorial immunity. The Ninth Circuit's decision has limited clearly established precedent as defined by the Supreme Court. Additionally, the Ninth Circuit's decision will have a chilling effect on the ability of prosecutors to effectively conduct their discretionary duties.

Therefore, this Court should grant Petitioner's writ of Certiorari, because the Ninth Circuit's decision is inconsistent with the prior precedent established by this Court and contrary to the public policy that underlies the granting of prosecutorial immunity.

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1. This brief has been authored in its entirety by undersigned counsel for the *amicus curiae*. No person or entity, other than the named *amicus* and its counsel, made any monetary contribution to the preparation and submission of this brief.

ARGUMENT

I. The Communications of the District Attorney to the School Police Department Regarding Botello are Subject to Absolute Immunity from Civil Liability.

The communications of the district attorney regarding hiring and assignment of Botello are "intimately associated" with the judicial process and, therefore, Gammick and Helzer are absolutely immune from civil liability with regard to those communications. *See Burns v. Reed*, 500 U.S. 478, 486, 11 S. Ct. 1934 (1991). The Ninth Circuit found that Gammick and Helzer were not immune from liability for their communications attempting to dissuade the School Police Department from hiring Botello, and insisting that Botello be barred from all investigations. *Botello v. Gammick*, 413 F.3d 971 (2005). The court reasoned that the action of the District Attorney was within the administrative function of the prosecutor because it was merely an attempt to disrupt an employment decision. *Id.* at 977-78. This decision is contrary to the precedent regarding prosecutorial immunity as well as the public policy behind the recognition of prosecutorial immunity.[2]

A. The Communications to the School Board were intimately associated with the Judicial Process.

The Ninth Circuit divided the acts of Gammick and Helzer into three categories when analyzing whether they were entitled to immunity: (1) their communications to the School Police Department in an effort to dissuade it from hiring Botello; (2) their decision not to prosecute Botello's cases; and (3) their communications to the School Police Department insisting that Botello be barred from all stages

2. Given the procedural posture of this case, Amicus is bound to assume all facts contained in the complaint as true.

of the criminal investigative process. *Id.* The court found that Gammick and Helzer were immune from liability for their decision not to prosecute Botello's cases, but were not immune for the communications to the School Police Department. *Id.*

In determining whether a prosecutor is absolutely immune from liability for his or her conduct, this Court has adopted a functional test which looks to the nature of the function performed rather than the identity of the actor who performs it. *Kalina v. Fletcher*, 522 U.S. 118, 127, 108 S. Ct. 538 (1997). The Court has made a distinction between acts which are judicial, administrative and investigative. Prosecutors enjoy absolute immunity for acts that are "intimately associated" with the judicial phase of the criminal process. *Burns*, 500 U.S. at 486. However, absolute immunity is not granted for acts that are deemed administrative or investigative. *Forrester v. White*, 484 U.S. 219, 108 S. Ct. 538 (1988) (finding that decisions by a judge in the capacity as an employer were not entitled to absolute immunity), *Buckley v. Fitsimmons*, 509 U.S. 259, 113 S. Ct. 2606 (1993) (holding that prosecutors are not entitled to absolute immunity for advising police officers during the investigative phase). As recognized by the Ninth Circuit, "the line between the functions is not entirely clear." *Botello*, 413 F.3d at 976.

As a starting point of the analysis, the Ninth Circuit correctly determined that the prosecutors were absolutely immune for their decision not to prosecute any case which involved Botello. *Id.* at 977. A prosecutor is absolutely immune for his decision not to prosecute a particular case. *Burns*, 500 U.S. at 486. In looking at the rationale behind the granting of immunity to a prosecutor for a decision not to prosecute a particular case, there is no reason to distinguish between that decision and decisions not to pursue prosecutions for a particular group of cases. *Roe v. City and County of San Francisco*, 109 F.3d 578 (1997). Therefore,

the decision to not prosecute a group of cases (those in which Botello investigated) is not subject to civil liability.

With this as the starting point, the issue becomes whether prosecutors become civilly liable for the communication of a policy not to prosecute crimes investigated by a particular investigator to the appropriate law enforcement agency, and for encouraging that agency to place the investigator in a position which will not prejudice future criminal investigations in accordance with that policy.

The communications that were deemed not associated with the judicial process included Gammick's and Helzer's communication to the School Police Department to encourage them not to hire Botello and the communication to the School Police Department that requested that Botello not be involved in any criminal investigation. *Botello*, 413 F.3d at 977-78. Gammick and Helzer articulated their decision not to prosecute any cases in which Botello investigated, a decision for which the Ninth Circuit found them to be absolutely immune. This decision is well within the province of the prosecutorial function, and not subject to review of the motivation of that decision by a civil court. *Roe*, 109 F.3d at 584. The prosecutors then encouraged the School Police Department to not hire Botello and later requested that he not be involved in investigations. The communications were necessary advice to a law enforcement agency within their jurisdiction of the prosecutorial decision in order to limit the prejudice of future criminal investigations by that agency. The underlying decision has been found to be a matter within the judicial function that is subject to absolute immunity. It would be contrary to the rational underpinnings of absolute prosecutorial immunity to grant immunity for the decision not to prosecute, and then subject the prosecutor to civil liability for communications necessary to implement that decision.

This Court has held that prosecutors are absolutely immune from liability for their conduct in "initiating a prosecution and in presenting the State's case." *Burns*, 500 U.S. at 485-86 (*quoting Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984 (1976)). The communications involved in this case were related to the initiation of future prosecutions. The communications included advice to the School Police Department on investigating crimes that was consistent with their prosecutorial policy. It was not advice on the investigative phase of a particular criminal case, *Burns*, 500 U.S. at 493, nor any action that was typically a function of police, *Buckley*, 509 U.S. at 274-76, but rather centered on future prosecutorial decisions. Those decisions are within the judicial function of the prosecutors.

B. The Public Policy underlying the granting of Prosecutorial Immunity Supports the Granting of Immunity in this Case

The communication made by Gammick and Helzer to the school police department should be protected by absolute prosecutorial immunity because of the public policy that underpins the granting of such immunity. As stated previously by this Court, potential liability "would prevent the vigorous and fearless performance of the prosecutor's duty which is essential to the proper functioning of the criminal justice system." *Burns*, 500 U.S. at 485-86 (*quoting Imbler v. Pachtman*, 424 US. 409, 96 S. Ct. 984 (1976)). "By its nature, however, the threat of liability can create perverse incentives that operate to *inhibit* officials in the proper performance of their duties." *Forrester*, 484 U.S. at 223 (emphasis in original). Exposing government officials to potential liability "detracts from the rule of law instead of contributing to it." *Id.* At the heart of the prosecutor function is the discretion of whether to prosecute cases. Prosecutors must be given the uninhibited freedom to evaluate witnesses and evidence in order to make that determination. It is because of this need

for freedom to evaluate the case that "a prosecutor's professional evaluation of a witness is entitled to absolute immunity even if that judgment is harsh, unfair or clouded by personal animus . . ." *Roe*, 109 F.3d at 584.

The effect of the decision of the Ninth Circuit in this case is to thwart the ability of a prosecutor to make the type of decision that is necessary for the proper functioning of the criminal justice system. It is clear from the decision of the lower court that the prosecutor can evaluate an investigator and determine that they will not prosecute any cases in which that investigator will be a witness. The motives for this decision are irrelevant to the functional analysis. However, the court ruled that the prosecutor cannot communicate this policy to the appropriate agency and recommend steps be taken by that agency to limit the prejudice created by that investigator. For example, assume that an investigator exists that the prosecutor deems to be an inappropriate witness. The prosecutor makes the decision to not prosecute any cases that are investigated by that officer. In order to ensure that as little effect on the criminal justice system as possible is made by that decision, the prosecutor takes the natural step of informing the investigator's supervisors of the policy and recommends steps that should be taken in accordance with that policy. Subjecting the prosecutor to liability for the decision to communicate the policy to the appropriate law enforcement agency will have a chilling effect on future prosecutorial decisions. A prosecutor will be forced to either reject the policy of not prosecuting a group of cases, or maintain the policy but be unable to communicate the policy and continue to not prosecute cases by a particular investigator (even though the problem could be reduced by working with the appropriate law enforcement agency). The effect would be to force prosecutors to not prosecute valid criminal cases because a primary witness is unreliable or to prosecute those cases and put an unreliable witness on the stand.

CONCLUSION

The decision not to prosecute any cases in which Botello investigated is "intimately associated" with the judicial phase of the criminal process. The communication of that policy coupled with advice on how to proceed with personnel matters consistent with that policy is also intimately associated with the judicial process and is a necessary step to implement the policy. Therefore, all acts complained of by Botello should be dismissed because the prosecutor has absolute immunity for those acts.

Respectfully submitted,

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